United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1453

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Lawrence H. Levner, Esq.

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P&S

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 76 Cr. 1453

ERIC DANIELS, :

Appellant. :

- -x

On Appeal from the United
States District Court For
Southern District of New York

Appellant's Brief

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Appellant's Brief

Statement of the Issues Presented for Review

1. WAS THE EVIDENCE OFFERED AGAINST THE APPELLANT AT TRIAL THE PRODUCT OF A SEARCH CARRIED OUT IN VIOLATION OF THE FOURTH AMENDMENT AND SHOULD IT HAVE BEEN EXCLUDED ABSENT A CLEAR AND POSITIVE SHOWING BY THE GOVERNMENT THAT ITS AGENT WAS IN THE APARTMENT AT THE INVITATION OF THE OCCUPANTS?

2. WAS THE APPELLANT DEPRIVED OF A FAIR TRIAL BY THE PREJUDICIAL COMMENTS OF THE JUDGE AND THE ADMISSION OF PREJUDICIAL EVIDENCE?

Preliminary Statement

The appellant, Eric Daniels, was arrested on May 1, 1976. An indictment charging him with conspiracy to commit offenses against the United States (Count 1) robbery of a post office with a dangerous weapon (Counts 2 & 3) and possession of stolen money orders (Count 4) was filed against him on May 13, 1976.

The appellant pleaded not guilty on May 20, 1976. Following a seven day trial, the jury found the appellant guilty on all four counts. On September 21, 1976 a judgment was filed, sentencing the appellant to a term of imprisonment of three (3) years on Count 1, and a five (5) year term on Count 4, to run consecutively. The appellant was sentenced to a suspended term of twenty-five (25) years on Counts 2 and 3, to be followed by a period of one (1) day of unsupervised probation.

This is an appeal from the conviction below.

Statement of Facts

At approximately seven forty-five on the morning of May 1st, 1976, the Hell Gate branch of the United States Postal Service was robbed by three armed men. After entering, in an as yet unexplained fashion, the branch's vault and the safes therein, they were able to escape with a substantial quantity of blank postal money orders, a postal money order validating machine and the content of a number of postal clerk's drawers.

Late that morning, Katherine Stubbington called the Postal Inspection Service. She told Inspector Mackin that she had received a telephone call from the appellant who had informed her that he had come into possession of some postal money orders and asked her whether she possessed any fake identification. In due course, Ms. Stubbington was taken to the Post Office at 149th Street and Grand Concourse in the Bronx by two postal inspectors. There she made a further telephone call to the appellant, telling him that she had located a man who could produce false identification. Accompanied by Postal Inspector Monroe, posing as the forger, Ms. Stubbington proceeded to 22 West 121st Street in Manhattan.

From the testimony presented at the trial, it would seem that one "Gene", subsequently identified as the defendant Brown, admitted Monroe and Stubbington to the courtyard in front of the building at 22 West 121st Street. However, neither Monroe nor Stubbington could state how they had gained entry to the ground floor apartment. No testimony was presented as to whether the apartment door was open or closed, as to whether anyone opened it to let them in, or as to the order in which they entered the apartment. In short, Monroe and Stubbington could only state that they found themselves in the apartment.

Monroe and Stubbington testified that, once inside the apartment, they discussed manufacturing some false identification with the defendants Brown and Don Daniels. During this discussion, Stubbington picked up a money order from a stack near her seat and handed it to Monroe asking him whether he could make a copy of it. After agreeing to manufacture the requested identification, Monroe left with Stubbington.

Inspector Monroe testified that he left the apartment at approximately four-fifteen. He first called his base station to report and then went to the United States Attorney's Office to prepare an affidavit in support of a search warrant. This affidavit was based upon what he had seen at 22 West 121st Street, and particularly upon his recollection that the serial number of the money order which Stubbington had handed him matched the number of one of the money orders stolen from the Hell Gate branch.

The search warrant was issued at nine that evening whereupon Monroe returned to 22 West 121st Street to execute it. In the meantime agents stationed around the building had arrested the defendants Brown, Eric Daniels and Don Daniels as they were about to enter a car near the building. Subsequent to these arrests the agents broke down the door to the apartment in an effort to find Sylvia Diaz who had been present during Monroe's visit. Ms. Diaz was later found on an upper floor of the building. According to

the testimony presented at trial, the search of the apartment, beyond that for Diaz, was conducted until Inspector Monroe returned with the warrant.

Argument

Point I

THE EVIDENCE INTRODUCED AT TRIAL WAS THE FRUIT OF A SEARCH VIOLATIVE OF THE FOURTH AMENDMENT. ABSENT A CLEAR AND POSITIVE SHOWING BY THE GOVERNMENT THAT ITS AGENT ENTERED THE APARTMENT AT THE REQUEST OF ITS OCCUPANTS, SUCH EVIDENCE SHOULD HAVE BEEN EXCLUDED.

The Fourth Amendment guarantees that,

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Supreme Court has repeatedly stated that the Fourth Amendment is to be given a generous interpretation in order to present the gradual depreciation of the rights it secures by the imperceptible practice of the courts or by the well-intentioned but mistakenly overzealous efforts of executive officers. Byars v. United States 273 U.S. 28, 47 S.Ct. 248, 71 Led. 520 (1927), Gouled v. United States 255 U.S. 298, 41 S.Ct. 261, 65 Led. 647 (1921), Weaks v. United States 232 U.S. 383, 34 S.Ct. 341 (1914).

Although the majority of Fourth Amendment cases have dealt with the reasonableness of an overt search or the validity

of the consent to a search, the courts have long recognized that stealth and deceit can be as violative of the rights guaranteed by the Amendment as outright coercion. Speaking for the Court in Gouled v. United States, supra, Mr. Justice Clarke stated that,

> "...if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one of only admission were obtained by stealth of by force or coercion."
>
> 41 S.Ct. at 263

The Supreme Court has also held that the knowledge acquired through an illegal search cannot subsequently be used by the government to obtain evidence legally. In Silverthorne Lumber Co. v. United States 251 U.S. 385, 40 S.Ct. 182 (1920) Mr. Justice Holmes said,

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursued by doing the forbidden act... In our opinion such is not the law. It reduces the Fourth Amendment to a form of words....The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

In the instant case, it is highly improbable that the government could have obtained a search warrant with the information which Stubbington provided after her telephone conversations with the appellant and the occupants of 22 West 121st Street. (TR 1010-1015) Indeed, the government by its own actions demonstrated that it believed its position too weak to obtain a search warrant. In the midst of a search for possibly dangerous armed robbers it was willing to send an unarmed agent into their midst in the guise of a forger. It was only after Inspector Monroe had penetrated the apartment that the building was surrounded and that steps were taken to obtain judicial sanction for a search. (TR 54, 729-30). If Inspector Monroe's initial visual search of the apartment is allowable under the terms of the Fourth Amendment, then the warrant was properly issued, the search was legal and the evidence was properly admitted at trial. If Monroe's initial survey of the apartment was illegal under the Fourth Amendment, however, the fruit of this search was not admissible into evidence.

While the cases to date have held that where the defendant invited an informant into his home, or took informant into his confidence, the information gained thereby was not obtained in violation of the Fourth Amendment, they have not delineated the burden which the government must bear in showing that the defendant acted voluntarily. Hoffa v. United States 385 U.S. 293,

87 S.Ct. 408, 17 Led. 2d 374 (1966), Lewis v. United States 385 U.S. 206, 87 S.Ct. 424, 17 Led. 2d 312 (1966).

It is the appellant's contention that the Government must, in these circumstances, meet the same burden of proof that it faces when a consent to search is alleged to have been coerced. In United States v. Smith 308 F.2d 657 (2d Cir. 1962), cert. denied 372 U.S. 906, 83 S.Ct. 717, 9 Led. 2d 716 (1963), this Court stated that,

> "...an accused's voluntary consent must be proved by clear and positive evidence. A consent is not a voluntary one if it is the produce of duress or coercion, actual or implicit. Moreover, to be voluntary, a consent must have been unequivical, specific, and intelligently given. Judd v. United States, 89 U.S. App. D.C. 64, 190 F.2d 649, 651 (1951); see Amos v. United States 255 U.S. 313, 41 S.Ct. 266, 65 Led. 654 (1921); Karwicki v. United States 55 F.2d 225, 226 (4 Cir. 1932) (per curiam); Kovack v. United States, 53 F.2d 639 (6 Cir. 1931) (per curiam); United States v. Kelih 272 F.2d 484, 490-491 (S.D. Ill. 1921)." 308 F.2d 657, See also: United States v. Curiale 414 F.2d 744 (2d Cir. 1969 cert. denied 396 U.S. 959, 90 S.Ct. 433, United States v. Thompson 356 F.2d 216, 220 (2d cir. 1965).

In United States v. Cosmo 340 F.2d 891 (2d Cir. 1965) where two Federal Bureau of Narcotics agents forced a special employee working for another team to reveal the narcotics contents of his room before allowing him to make a telephone call to his superiors which he thought would exonerate him, this Court found that the government had not met its burden of proving the consent voluntary. On the contrary it found Cosmo's consent to have been

the product of deceit and coercion.

In the instant case, the government was unable to establish by clear and positive evidence that Inspector Monroe had entered the apartment at the express invitation of the inhabitants. Indeed, Inspector Monroe could not recall whether the apartment door was open or closed (TR 64, 86-88). Nor could he remember in which order he, Stubbington had entered the building or the apartment (TR 65, 66, 86-88).

In these circumstances, the government has failed to show by clear and positive evidence how its agent obtained entry to the apartment. Furthermore, the government's witness' lack of memory concerning his entry into the apartment effectively deprived the appellant of any opportunity to cross-examine. If the Government is not required to show by clear and positive proof that its agent entered the apartment at the invitation of the occupants, the guarantees of the Fourth Amendment will have been circumvented. Not only would the door be open to purely exploratory searches but their product could then be made to satisfy the formal requirements of the Fourth Amendment by the simple expedient of having the fruit of the illegal search serve as the probable cause necessary to the issuance of a warrant. The Fourth Amendment would be reduced to "a form of words".

Point II

THE APPELLANT WAS DEPRIVED OF A FAIR TRIAL IN THAT PREJUDICIAL COMMENTS BY THE JUDGE AND EVIDENCE, WHICH NO INSTRUCTION COULD REASONABLY BE EXPECTED TO CURE, CAME TO THE ATTENTION OF THE JURY.

On direct examination, Robert Neely, a Government witness, was asked whether he saw, in the courtroom, any of the men who had robbed the Hell Gate Station on May 1st, 1976. His initial answer was, "Well, I'm not too sure." (TR 282). In the course of the discussion between the Bench and counsel, the following exchange took place, in open Court:

> Mr. Schmukler: Common sense tells us that there are only three defendants sitting at the defense counsel table.
>
> The Court: So far you have not had too bad luck in that regard...[referring to the collective failure of the government's witness to identify the perpetrators of the robbery.] (TR 283).

Somewhat later in the course of the trial, the prosecutor read the following passage for the grand jury minutes during the redirect examination of Patricia Booth Cornwall:

> "'Q: Let me ask you, Ms. Booth, when you testified here yesterday you have already said that you did not tell the truth. Was that because you were afraid?'
>
> 'A: Yes.'" (TR 705).

After each of these incidents, the Court instructed the jury to disregard what they had heard. Although it may generally

be true that instructions can cure the errors which will inevitably occur in the course of a trial, it cannot reasonably be agreed that the prejudicial effect which these remarks had upon the minds of the jury was cured in the particular circumstances of this case by an instruction.

The evidence offered against the defendants consisted entirely of the money orders, validating machine and other artifacts seized at 22 West 121st Street and of the testimony of a co-conspirator. Taking the evidence in the light most favorable to the government's case, only one piece of evidence tended directly to prove that the appellant had participated in the robbery. This was Neely's hesitant identification of the appellant as one of the robbers. To reach a verdict of guilty the jury would necessarily have had to rely upon inference. In these circumstances, it is essential that the judge not give the jury the impression that the defendant's case is of little substance and not worthy of very much attention. United States v. Coke 339 F.2d 183 (2d Cir. 1964); United States v. DeSisto 289 F.2d 833 (2d Cir. 1961); United States v. Ah Kee Eng 241 F.2d 157 (2d Cir. 1953). The judge's comment that the defendants had been lucky as not being identified by the postal employee witnesses can only have led the jury to believe that the judge was convinced of the defendants guilt. One cannot say that this knowledge did not influence the jury in their weighing of the evidence.

The prosecutors reading of a highly prejudicial position of the key government witness's grand jury testimony similarity could not be cured by an instruction. Cornwall's credibility was central to the government's case. That she claimed that her prior perjury had been induced by fear could only lead the jury to infer that the defendants were dangerous. Basing themselves on the assumed dangerous character of its defendants, the jury could then infer that they would be the sort of men likely to rob a post office. Where the jury would have to base its conclusion that the defendants robbed the Hell Gate Station almost entirely upon inference, it cannot be argued that this allegation of the defendants' dangerous character was effectively erased from their minds by an instruction. Even if the jury conscientiously sought to follow the judge's instruction to forget what they had heard, the knowledge thus sustained must have affected their perception of the appellant.

Pursuant to the rules of Federal Appellate Procedure, all arguments filed by co-appellants are incorporated by reference.

Conclusion

THE APPELLANT'S CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL WHEREIN THE GOVERNMENT SHOULD BE REQUIRED TO SHOW BY CLEAR AND POSITIVE EVIDENCE AGAINST THE APPELLANT WAS NOT OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT.

Respectfully submitted,

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